In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1117

CONDOR OPERATING COMPANY AND ITS JOINT VENTURERS, JAMES E. HALL, CHARLES L. HALL, AND FROST NATIONAL BANK AND JAMES E. HALL, AS CO-TRUSTEES OF THE RICHARD A. HALL TRUST, PETITIONERS

v.

FRANK G. ZARB, ADMINISTRATOR, FEDERAL ENERGY ADMINISTRATION, AND FEDERAL ENERGY ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A) is not reported. The opinion of the Temporary Emergency Court of Appeals (Pet. App. C) is not yet reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on February 7, 1975. The petition for a writ of certiorari was filed on March 6, 1975. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended, 85 Stat. 743, 750, 87 Stat. 27, and 28 U.S.C. 1254(1).[1]

[1]See also Section 5(a) of the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 633, incorporating Section 211(g) of the Economic Stabilization Act by reference.

QUESTION PRESENTED

Federal Energy Office (F.E.O.)[2] Regulation 10 C.F.R. 211.63(a)[3] requires that all supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973, shall remain in effect for the duration of the F.E.A.'s regulatory progam. The question presented is:

Whether F.E.A.'s regulation 211.63(a) requiring the maintenance of a December 1, 1973 supplier/purchaser relationship for the sale of domestic crude oil contravenes a supplier's due process rights under the Fifth Amendment to the United States Constitution.

STATUTES AND REGULATIONS INVOLVED

The relevant regulation at issue is 10 C.F.R. 211.63 (a), which is set forth at Pet. 4. The F.E.A.'s clarifying amendment to Section 211.63(a)[4] is set forth in the Appendix to this brief in opposition

STATEMENT

Petitioners seek review of a decision by the Temporary Emergency Court of Appeals upholding the constitutionality of F.E.A.'s Mandatory Petroleum Allocation and Price Regulation (10 C.F.R. 211.63(a)) requiring the maintenance of supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil as they existed on December 1, 1973 (Pet. 4).

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[2]The F.E.O. became the Federal Energy Administration on June 27, 1974, pursuant to the Federal Energy Administration Act of 1974, P.L. 93-275, 88 Stat. 96, *et seq.*, 15 U.S.C. 761, *et seq.*, and hereafter will be referred to as F.E.A.

[3]Section 211.63(a) (39 Fed. Reg. 35525, October 1, 1974) was originally promulgated as 211.64(a) and published in the Federal Register on January 15, 1974 at 39 Fed. Reg. 1939. The regulation will be hereafter referred to as 211.63(a).

[4]The clarifying language in the January 30, 1974 Federal Register refers to the F.E.A. regulation at issue here as Section 211.64 since that regulation did not become 211.63 until its renumbering and republication on October 1, 1974.

In the fall of 1973 in response to existing and impending nation-wide petroleum shortages, caused in part by the Arab oil embargo, Congress enacted the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 627. The shortages were found to have created or to be likely to create "severe economic dislocations and hardships" which would "jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare * * * " (87 Stat. 628).

The President or his delegate was authorized to promulgate regulations to provide "to the maximum extent practicable" for, among other things, the allocation of crude oil to permit the operation of refineries at full capacity and the equitable distribution of crude oil among regions of the country and sectors of the petroleum industry (87 Stat. 629-630).

F.E.A., pursuant to the Congressional mandate, promulgated Section 211.63(a) as part of its mandatory allocation regulations specifically to prevent alteration of any domestic crude oil supplier/purchaser relationships which existed on December 1, 1973. Subsequently, on January 28, 1974, the F.E.A. added a clarifying amendment (39 Fed. Reg. 3908, January 30, 1974) to the regulation at issue here establishing that it is the supplier/purchaser relationships in effect under contracts rather than the contracts themselves which are to remain in effect for the duration of the regulatory program (App., *infra*).

Petitioners are members of a joint venture that, together with other parties including Phillips Petroleum Company, owns undivided interests in oil and gas leases in Ector County, Texas. The operating agreement concerning the leases provides that owners shall have the right either to take their shares of production in kind or to sell them (Pet. App. C 13a).

From 1959 through April, 1974 (*i.e.*, including December 1, 1973), the petitioners sold their full share of crude oil production to Phillips Petroleum Company. Then, determining that their profits would be higher if they refined their own crude oil, petitioners began to exercise the option in the operating agreement which permitted any party to take his share of production in kind at any time (Pet. App. C 13a-14a).

On August 12, 1974, F.E.A. issued a Remedial Order to Condor Operating Company requiring maintenance of the December 1 supplier/purchaser relationship with Phillips Petroleum as required by Section 211.63(a) of the agency regulations. Petitioners filed suit in the district court seeking to enjoin enforcement of the F.E.A. Remedial Order. The district court issued its order on September 26, 1974 preliminarily enjoining the F.E.A. from enforcing the Remedial Order. Furthermore, the district court held that if its construction of Section 211.63(a) was incorrect, a substantial constitutional issue existed requiring resolution by the Temporary Emergency Court of Appeals. The October 3, 1974 certification by the district court to the court of appeals resulted in resolution of both constitutional and non-constitutional issues, as permitted by Section 5(a) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633.

The Temporary Emergency Court of Appeals held that Section 211.63(a) has a rational basis and constitutes an integral part of F.E.A.'s regulatory program. The court found that Section 211.63(a) precludes the petitioners from exercising their contractual option to take their crude oil production in kind, and that the regulation does not unconstitutionally deprive petitioners of their property without just compensation or without due process of law.

ARGUMENT

1. Petitioners contend (Pet. 15) that Section 211.63(a) contravenes the due process clause of the Fifth Amendment because it deprives them of their option to take their share of crude oil production in kind. Petitioners concede (Pet. 9) that they could be lawfully restricted to sales to historical purchasers and that F.E.A. may lawfully regulate the volume of crude oil produced and the price at which it is sold. But petitioners maintain (Pet. 11) that an owner of property cannot be compelled to sell against his will.

The court of appeals, relying on this Court's decision in *Block* v. *Hirsh,* 256 U.S. 135, properly rejected this claim. In *Block,* the constitutionality of an emergency rent control provision that permitted tenants to continue in possession beyond the expiration of their leases was upheld. The temporary suspension of ownership prerogatives was justified by emergency conditions, and there, as in this case, owners were "assured of compensation based upon administratively determined 'reasonable' prices for the controlled property" (Pet. App. A 27a).

The principle of the *Block* decision—that the Constitution may authorize the prevention of "immediate and literal enforcement of contractual obligations by a temporary and conditional restraint, where vital public interests would otherwise suffer" (*Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398, 440) is manifestly applicable here. See *Village of Belle Terre* v. *Boraas,* 416 U.S.1.

2.The court of appeals also properly rejected petitioners' non-constitutional challenge to the validity of Section 211.63(a). The court found that a regulation maintaining supplier/purchaser relationships as of December 1, 1973 served, consistent with the mandate of the Emergency Petroleum Allocation Act of 1973, to pre-

serve and stabilize the nation's crude oil distribution system at a time when there was maximum potential for disorder, and thus is not irrational, arbitrary, capricious or beyond the powers delegated by Congress (Pet. App. C 19a-21a, 23a-25a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1975..

APPENDIX

Federal Energy Office clarifying amendment to 10 C.F.R. Section 211.64(a), 39 Fed. Reg. 3908, January 30, 1974.

Title 10—Energy
CHAPTER II—FEDERAL ENERGY OFFICE
PART 211—MANDATORY PETROLEUM ALLOCATION REGULATIONS
Allocation of Crude Oil

Subpart C of the Mandatory Allocation Regulations, concerning the allocation of crude oil, is amended in several respects to clarify certain aspects of that program. The amendments involve clarification of exemptions, definitions, reporting rules and the guidelines for sales relationships in crude oil allocation.

The scope section, § 211.61(a) is revised in an effort to clear up a misconception that "stripper well" crude is not subject to allocation at the refinery level. Under the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, only the first sale of such crude oil is free from control. Any subsequent sale, such as one made by the first transferee, is subject to control. Accordingly, the language of § 211.61 is adjusted to make this clear. A further amendment to Part 210 will also be issued soon to clarify that, in the case of the integrated producer and refiner, the "first sale" is deemed to occur at the transfer point where a value is established for purposes of computing the income tax depletion allowance.

Other changes involve the deletion of the separate definition of "refiner" in § 211.62. In computing the first refiners' buy-sell list issued on January 18, 1974 (39 FR 2522) it was not feasible to treat persons other than refiners who own or purchase crude oil for processing as refiners. Therefore, the prior definition of "refiner" is deleted and the general definition of "refiner" stated in §211.51 of Subpart B fully applies to Subpart C. This amendment now conforms the definition of "refiner" with the definition used in the preparation of the buy-sell list. In accordance with this change of definition, § 211.65(g) has also been amended to clarify how crude oil processed under a processing agreement is to be treated in calculating supply capacity/ratios.

The definition of "refiner-buyer" has also been revised. After further consideration, it was determined that limiting the definition of a refiner-buyer to a refiner whose supply/capacity ratio is more than 0.02 below the national supply/capacity ratio is not desirable.

Therefore, as now defined, a refiner-buyer means any refiner whose supply-capacity ratio is below the national supply-capacity ratio and who is given the opportunity to purchase crude oil during a crude oil sales period. The definition of "refiner-seller" is also amended to clarify that this term refers to any refiner whose supply-capacity ratio is above the national supply-capacity ratio and who is required to sell crude oil pursuant to the operation of Subpart C.

Section 211.64 is amended to clarify that it is the supplier-purchaser relationship in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973, rather than the contracts themselves which are to remain in effect for the duration of the program. Thus, if by the contractual terms, the relationship between the supplier and purchaser is altered after December 1, 1973, this change would not be allowed to occur except as otherwise provided in § 211.64(a)(1), (2), and (3), or in § 211.24.

A limitation has also been imposed on the amounts which a refiner-buyer may purchase from a refiner-seller by an amendment to § 211.65(i). A refiner-buyer may not now purchase a quantity of crude oil from a refiner-seller which, when added to the refiner-buyer's total crude oil supply will exceed 100 percent of the refiner-buyer's refining capacity.

Finally, changes have been made to the reporting requirements in § 211.66 to indicate that the amounts of crude oil processed by a refiner for a non-refiner must be reported as well as amounts of crude oil in excess of 1973 levels and crude oil produced from a stripper well lease.

Because the purpose of these amendments is to provide immediate guidance and information with respect to the mandatory petroleum allocation rules and regulations, the Federal Energy Office finds that normal rulemaking procedure is impracticable and that good cause exists for making these amendments effective in less than 30 days.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, E.O. 11748, 38 FR 33575; Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11730, 38 FR 11345; Cost of Living Council Order 47, 39 FR 24)

In consideration of the foregoing, Part 211 of Chapter II, Title 10 of the Code of Federal Regulations is amended as set forth below, effective 11:59 p.m., January 14, 1974.

Issued in Washington, D.C., January 28, 1974.

JOHN C. SAWHILL,
Deputy Administrator,
Federal Energy Office.